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No. 02-1667

IN THE

Supreme Court of the United States

STATE OF TENNESSEE,

Petitioner,

v.

GEORGE LANE, BEVERLY JONES, AND UNITED STATES OF AMERICA,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE TRAINING AND ADVOCACY SUPPORT CENTER OF THE NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF FOR THE TRAINING AND ADVOCACY SUPPORT CENTER OF THE NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*[1]

Amicus Training and Advocacy Support Center of the National Association of Protection and Advocacy Systems ("TASC/NAPAS") provides training and technical assistance to the nationwide system of protection and advocacy ("P&A") agencies. Located in all 50 states, the District of Columbia, Puerto Rico, and the territories (the Virgin Islands, Guam, American Samoa, and the Northern Marianas Islands), P&As are mandated under various federal statutes to provide legal representation and related advocacy services on behalf of all people with disabilities in a variety of settings. In fiscal year 2002, P&As served over 65,000 persons with disabilities through individual case representation and systemic advocacy.

The P&A system comprises the nation's largest provider of legally based advocacy services for persons with disabilities. P&As are particularly active in providing assistance to persons with disabilities under the Americans with Disabilities Act ("ADA").

Because of its national P&A membership and familiarity with the protections afforded by each state to persons with disabilities, TASC/NAPAS has firsthand knowledge of the state laws and how they operate in practice. TASC/NAPAS is thus uniquely suited to assist the Court in understanding the

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[1] No counsel for any party authored this brief either in whole or in part, and no persons other than the *amicus curiae* and their counsel made any monetary contribution to its preparation or submission. The parties' written consents to the filing of this brief have been filed with the Clerk of the Court.

state law backdrop against which Congress enacted the ADA as well as the status of that backdrop today.

INTRODUCTION AND SUMMARY

Title II of the Americans with Disabilities Act ("ADA") proscribes discrimination in the provision of public "services, programs, or activities." Section 202, 42 U.S.C. § 12132. After an exhaustive investigation, Congress determined that such national legislation was required, expressly finding that persons with disabilities "continually encounter * * * [the] failure to make modifications to existing facilities" such as court houses and polling places, and that discrimination against persons with disabilities persists in "access to public services." Section 2(a)(3), (5), 42 U.S.C. § 12101(a)(3), (5). Congress expressly determined that this discrimination continued in significant measure because persons with disabilities "have often had no legal recourse to redress such discrimination." Section 2(a)(4), 42 U.S.C. § 12101(a)(4). As a result, Congress concluded that "the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis." Section 2(a)(9), 42 U.S.C. § 12101(a)(9).

In the face of these express statutory findings, petitioner nevertheless suggests in its opening brief that the legislative history of the ADA demonstrates that when it enacted the ADA, Congress believed that state law was generally sufficient to safeguard against the pervasive discrimination against people with disabilities. Pet. Br. at 21–22 ("[F]ar from indicating concerns about state-sponsored misconduct, the legislative record reflects congressional recognition of the States' leadership in safeguarding the rights of the disabled," citing *Bd. of Trs. of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 368 n.5 (2001)).

Petitioner's error in this assertion is three-fold. First, petitioner ignores the clear legislative findings quoted above

specifically referencing the pervasive discrimination in facilities and services, and noting the inadequacy of existing remedies. Such legislative findings, included in the statutory text, must be given greater weight than isolated statements selected from the vast legislative history. See, *e.g.*, *Kimel* v. *Fla. Bd. of Regents*, 528 U.S. 62, 90-91 (2000) (noting that an examination of the legislative record is not necessary in all circumstances and striking down the ADEA in part because there were no statutory findings regarding state action).

Second, the weight of legislative history is in line with the statutory findings and contrary to petitioner's position. For example, the Fifty State Governors' Committees, on whose reports Congress relied, concluded that "existing State laws do not adequately counter such acts of discrimination." S. Rep. No. 101-116, at 18 (1989). And petitioner's suggestion regarding the adequacy of state law conflicts sharply with the conclusion of the Senate Report that "State laws are inadequate to address the pervasive problems of discrimination that people with disabilities are facing." *Id.*

Third, consistent with the legislative findings noted above, an examination of state laws in existence at the time the ADA was passed shows that they provided inconsistent and inadequate remedies and coverage, seriously limiting the ability of many persons with disabilities to gain redress for egregious discrimination by the states. Indeed, much of the "unfair and unnecessary discrimination and prejudice" that Congress observed can be traced directly to the states' failure to guarantee persons with disabilities access to state facilities and services.

We demonstrate that when the ADA was enacted, only one state had explicit statutory protection comparable to Title II of the ADA in the areas we discuss below. Thus, contrary to the suggestions of petitioner, Title II was not unnecessary legislation enacted over a landscape of protective state law. Rather, like the Family and Medical Leave Act of 1993

("FMLA") recently upheld in *Nevada Department of Human Resources* v. *Hibbs*, 123 S. Ct. 1972 (2003), Title II was enacted to respond to the inadequate protection provided by an incomplete and porous patchwork of state laws. 123 S. Ct. at 1980–81 (holding that Congress was justified in enacting the FMLA as remedial legislation, relying in part on the fact that the Court had identified fourteen states whose family leave policies had "important shortcomings").[2]

Title II ensures that persons with disabilities have consistent protection against discrimination in access to state facilities and services, regardless of the state in which they reside. See Section 202, 42 U.S.C. § 12132 ("[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."). Although we address state facilities and state services separately in this brief, the two go hand-in-hand because without accessible facilities most of a state's services will be inaccessible to persons with disabilities. See, *e.g.*, *Barden* v. *City of Sacramento*, 292 F.3d 1073, 1075 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 2639 (2003) ("One form of prohibited discrimination [under Title II] is the exclusion from a public entity's services, programs, or activities because of the inaccessibility of the entity's facility."). Similarly, a state facility that complies with Title II does not provide

[2] The Brief of *Amici Curiae* Alabama, Nebraska, Nevada, North Dakota, Oklahoma, Utah, and Wyoming in Support of Petitioner asserts (at 24) that "*existing* State laws are sufficient to address the vast majority of accessibility problems" (emphasis added) and includes an appendix of current state statutes. Following *Hibbs*, we focus initially on the status of state law when Congress passed the ADA. See 123 S. Ct. at 1980–81 (evaluating shortcomings in states' leave polices in existence at the time the FMLA was enacted). Nevertheless, in Part IV, we demonstrate that the State *Amici* supporting petitioner are wrong because current state laws do not in fact provide adequate accessibility for persons with disabilities.

meaningful access if state services within the facility are denied to persons with disabilities.

In Part I below we briefly describe the coverage of the ADA with respect to state facilities and services. We also explain why the ADA's remedial scheme is essential to this coverage. In Part II we demonstrate that in 1990, when the ADA was passed, thirty-four states had statutes that did not ensure access to state facilities in a manner equivalent to Title II. Then, in Part III, we shift our focus to state services and demonstrate that all but one of the states failed to provide access to state services in a manner equivalent to Title II.

Finally, we demonstrate in Part IV that state law remains inadequate today. Absent Title II, enforcement of the rights of people with disabilities to access state facilities and services would be greatly diminished. Thus, not only was Congress acting to remedy significant gaps in state anti-discrimination laws when it enacted the ADA, but the continuing vitality of Title II of the ADA is essential to secure the guarantee of equal protection and due process for all persons with disabilities.[3]

ARGUMENT

I. The ADA Provides Protection With Respect to Both State Facilities and State Services

The ADA's coverage of state facilities and services has two main components: a general prohibition of discrimination in

[3] In this brief, we rely heavily on the work of Professors Ruth Colker and Adam Milani in a recent article in the Alabama Law Review. Ruth Colker and Adam Milani, *The Post-Garrett World: Insufficient State Protection Against Disability Discrimination*, 53 Ala. L. Rev. 1075 (2002). This article surveys current state law in detail and concludes that absent the protections of Title II of the ADA, the protection available to persons with disabilities would be greatly diminished in a majority of states. In an appendix to the article, the authors attach a comprehensive state-by-state summary of state disability law as it relates to Title II of the ADA.

access to state facilities and services and a remedial scheme that deters such discrimination and provides appropriate relief when such discrimination occurs. Section 202, which prohibits discrimination in services, programs, and activities provides that:

> "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

Public facilities such as public buildings, sidewalks, and recreational facilities are covered in two ways. First, without access to public buildings, sidewalks, and recreational facilities, persons with disabilities are systematically denied the "services, programs, [and] activities" provided by the state. Second, the existing regulations from Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, expressly covered such facilities, and thus Congress ensured that Title II covered such facilities by specifically directing the Attorney General to adopt regulations "consistent with" the Rehabilitation Act regulations to cover "facilities." See Sections 204(b) and (c), 42 U.S.C. §§ 12134(b) & (c).[4]

Moreover, Congress recognized that without an effective remedial scheme such prohibitions would have little impact on the pervasive discrimination existing at the time and that the "inclusion of penalties and damages i[s] the driving force that facilitates voluntary compliance." S. Rep. No. 101-116, at 15 (1989). Title II therefore incorporates by reference the

[4] The Attorney General promulgated such regulations. See 28 C.F.R. § 35.149 (2003) ("[N]o qualified individual with a disability shall, because a public entity's facilities are inaccessible to or unusable by individuals with disabilities, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity.")

enforcement provisions under Section 505 of the Rehabilitation Act, 29 U.S.C. § 794a (which themselves are based on the remedies applicable to Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*). See Section 203, 42 U.S.C. § 12133. Under this remedial scheme plaintiffs may obtain injunctive relief and damages. The ADA also allows a successful plaintiff to receive "a reasonable attorney's fee, including litigation expenses, and costs." Section, 505, 42 U.S.C. § 12205. This set of remedies gives states a strong incentive to provide access to facilities and services and provides adequate redress for a person who encounters discrimination by the state.

Since 1990, persons with disabilities have relied on Title II to challenge numerous discriminatory acts involving core governmental functions. Respondents are among the many persons with disabilities who have used Title II to challenge a state's unwillingness to make its courts accessible to persons with disabilities. Title II has also been used to challenge discriminatory acts involving voting,[5] institutionalization,[6] education,[7] prisoners' rights,[8] law enforcement,[9] and public

[5] See, *e.g.*, *New York ex rel. Spitzer* v. *County of Schoharie*, 82 F. Supp. 2d 19 (N.D.N.Y. 2000) (failure to ensure that polling places were accessible to people with disabilities violated Title II); *Doe* v. *Rowe*, 156 F. Supp. 2d 35 (D. Me. 2001) (overbroad exclusion of individuals with mental illness from voting violated Title II).

[6] See, *e.g.*, *Olmstead* v. *L.C., ex rel. Zimring*, 527 U.S. 581 (1999) (unjustified institutional isolation of persons with disabilities violates Title II).

[7] See, *e.g.*, *Wong* v. *Regents of the Univ. of Cal.*, 192 F.3d 807 (9th Cir. 1999) (student with disability sued to require university to make reasonable modification).

[8] See, *e.g.*, *Pa. Dep't of Corr.* v. *Yeskey*, 524 U.S. 206 (1998) (Title II applies to state correctional facilities).

[9] See, *e.g.*, *Barnes* v. *Gorman*, 536 U.S. 181 (2002) (plaintiff sued police department for injuries sustained while being transported in a van not equipped to hold a wheelchair).

assistance programs.[10] By ensuring that individuals with disabilities have access to such basic facilities and services, Title II of the ADA has enabled them to participate as equal citizens in the most fundamental aspects of our society. Before the ADA was enacted, many state laws failed to adequately address the exclusion of people with disabilities from government facilities and services and their resulting isolation from public life and inability to participate fully in the rights and privileges of citizenship. Had Congress not enacted Title II, many people with disabilities would have remained second-class citizens, unable to have their day in court, attend school or state universities, cast a ballot, or receive public assistance benefits.

II. When the ADA Was Enacted, Individual State Laws Failed To Ensure Persons with Disabilities Access to State Facilities.

A. Remedies With Respect to State Facilities

In prohibiting discrimination in access to state facilities Congress recognized that "the rights guaranteed by the ADA are meaningless without effective enforcement provisions" and that "the inclusion of penalties and damages i[s] the driving force that facilitates voluntary compliance." S. Rep. No. 101-116, at 15 (1989). Congress was also aware of a report by the U.S. Commission on Civil Rights that found that seventy-six percent of state buildings were not accessible to persons with disabilities even though many states had statutes requiring that such buildings be accessible. See U.S. Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities 39 (1983). Thus, as discussed above, Congress guaranteed the enforcement of Title II's

[10] See, *e.g.*, *Lovell* v. *Chandler*, 303 F.3d 1039 (9th Cir. 2002), cert. denied, 537 U.S. 1105 (2003) (exclusion of persons with disabilities from state health insurance program violated Title II).

prohibitions by allowing those with the greatest incentive to enforce its prohibitions—persons with disabilities—to recover damages and attorney's fees when states failed to comply with Title II. See Sections 203 and 505, 42 U.S.C. §§ 12133 & 12205.

As reflected in the Senate report cited above, at the time Congress enacted the ADA most states failed to provide equivalent relief for discrimination in access to state facilities thus depriving their accessibility "requirements" of any real meaning. For example, in 1990 petitioner had a policy requiring accessibility in all "public buildings" that had been in effect since 1970. See Tenn. Code Ann. § 68-18-202 (1990) (historical notes indicate statute was enacted in 1970 Pub. Acts, ch. 484, § 2).[11] But no fine or penalty was available for state violations of this provision. See *id.* § 68-120-205 (1990). Thus, Tennessee and other states that did not provide meaningful enforcement mechanisms had no incentive to comply with their own accessibility statutes and failed to provide relief to individuals who suffered discrimination.

1. Private Right of Action for Damages

The private right of action for damages provided by Title II serves several important purposes. First, the threat of damages provides states with a strong incentive not to discriminate in providing access to its facilities. See *Owen* v. *City of Independence*, 445 U.S. 622, 651–52 (1980) (noting the deterrent effect of damage remedies on governmental conduct). Second, a person with a disability who suffers discrimination at the hands of the state should be able to

[11] In this brief, all citations to state statutes are taken from the online databases on either Westlaw or Lexis. The citations to historical statutes were taken from the databases on those services for the year identified. Citations to current law are taken from the current statute databases and identified as 2003.

receive damages for any compensable harm that is attributable to the discrimination. *Bivens* v. *Six Unknown Named Agents of Fed. Bur. of Narcotics*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring). Finally, a damage remedy is a particularly important remedy for discrimination in access to state facilities because when an individual is denied access to a state facility to which he may never return, such as a courthouse, he may lack standing to seek injunctive relief under this Court's precedents. See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 564 (1992). Thus, for some persons with disabilities, it may be that "damages is the only possible remedy." *Bivens*, 403 U.S. at 409.

A survey of state accessibility statutes in 1990 reveals that thirty-one states either did not clearly allow a person who was illegally denied access to a facility to sue for damages or significantly restricted such relief. First, nineteen states did not clearly allow a private right of action for facilities discrimination. For example, Alabama's statute had two provisions requiring state facilities to be accessible. See Ala. Code §§ 21-4-4, 21-7-2 (1990). Section 21-4-4 was enforced by the state fire marshal who could order compliance, see Section 21-4-7, while Section 21-7-2 could only be enforced by a misdemeanor penalty, see Section 21-7-5. Because a state prosecutor cannot bring a criminal action against the state, the misdemeanor penalty does not even apply to state discrimination. Thus, Alabama provided no private right of action against the state for discriminating in providing access to the state's facilities.[12]

[12] See also Ariz. Rev. Stat. Ann. § 34-438 (1990) (state has enforcement authority); Ark. Code Ann. § 20-14-302 (1990) (only penalty a misdemeanor) and *id.* § 20-14-610 (1990) (state has enforcement authority); Cal. Gov't Code § 4458 (1990) (government can "bring an action to enjoin a violation") and *Black* v. *Dep't of Mental Health*, 100 Cal. Rptr. 2d 39 (Ct. App. 2000) (affirming lower court's finding that state is not a "business establishment[ ]" covered by Cal. Civ. Code § 51

Second, in three additional states an individual could bring a private right of action, but could not recover damages (even for intentional discrimination).[13] Six other states failed to

(1990); Ga. Code Ann. § 30-3-5 (1990) (state has enforcement authority) and *id.* § 30-4-3 (1990) (only penalty a misdemeanor); Haw. Rev. Stat. Ann. § 489-7.5 (1990) (provision allowing private right of action not effective until 1991); Idaho Code § 39-3201 (1990) (state has enforcement authority); Ind. Code Ann. §§ 22-9-8-1, -3 (2003) (see historical notes) (provisions allowing private right of action under Ind. Code Ann. § 22 9-1-2 (1990) not effective until 1994) and *id.* § 22-15-2-7 (1990) (state has enforcement authority); Md. Ann. Code art. 49B, § 5 (1990), and *Johnson* v. *Tufton Group, Inc.*, No. CIV. L-99-144, 2001 WL 210046, at *4 (D. Md. Feb 28, 2001) (only state agency may enforce art. 49B, § 5); Miss. Code Ann. § 43-6-11 (1990) (misdemeanor is only penalty specified) and *id.* § 43-6-123 (1990) (state given limited enforcement authority); N.D. Cent. Code § 48-02-19 (1991) (see historical notes in 1991 database) (no enforcement mechanism for violations); N.H. Rev. Stat. Ann. § 354-A:22 (2003) (see historical notes in 2003 database) (provision allowing private right of action effective in 1992); N.Y. Pub. Bldgs. Law § 50(1), 51 (1990) (no private right of action specified) and N.Y. Exec. Law § 296(2)(a) (1990) (does not clearly apply to the state); Neb. Rev. Stat. Ann. § 20-129 (1990) (misdemeanor is only penalty specified) and *id.* §§ 72-1119, 72-1124 (1990) (state given limited enforcement authority but misdemeanor only penalty specified); Okla. Stat. tit. 25 § 1402 (1990) (no private right of action specified); S.D. Codified Laws § 20-13-35.1 (2003) (see historical notes in 2003 database) (provision allowing private right of action added in 1991) and *id.* § 5-14-14 (1990) (state enforces building code); Tenn. Code Ann. § 68-120-205(b) (1990) (no penalty may be assessed against the state); Utah Code Ann. § 26-29-4 (1990) (state has limited enforcement authority) and *id.* 26-30-4 (1990) (misdemeanor is only penalty specified); Wyo. Stat. Ann. § 35-13-203 (1990) (misdemeanor is only penalty specified) and *id.* § 16-6-501 (1990) (state given limited enforcement authority).

[13] See Colo. Rev. Stat. Ann. § 24-34-306 (1990) (allowing private right of action) and *City of Colo. Springs* v. *Conners*, 993 P.2d 1167, 1171 (Colo. 2000) (holding that Colorado Governmental Immunity Act bars compensatory damages against the state but permits equitable relief for civil rights violations allowed); Conn. Gen. Stat. Ann. § 46a-99 (1990) (injunctive relief only); N.C. Gen. Stat. § 168A-11(b) (1990) (allows declaratory and injunctive relief but not damages).

provide adequate relief because the states had significant limits on the amount of damages that an individual could recover. In South Carolina, for example, a successful plaintiff's recovery of actual damages was limited to $5,000. See S.C. Code Ann. § 43-33-540 (1990).[14] Finally, three states allowed a private right of action for damages against the state but this remedy was not clearly available for discrimination involving all state facilities.[15]

2. Attorney's Fees

Attorney's fees, like damages, play a critical role in the enforcement of facilities accessibility requirements. The enforcement of accessibility requirements, like other civil rights laws, is dependent to a large degree on causes of action filed by plaintiffs acting as "private attorney[s] general." *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402

[14] See also Fla. Stat. Ann. § 768.28 (1990) (relief against state capped at $100,000); Kan. Stat. Ann. § 44-1005(k) (1990) ($2,000 limit on damages for pain, suffering and humiliation); Nev. Rev. Stat. Ann. § 651.090(1) (1991) (see historical notes in 1991 database) (Section 41.035 (1991) imposes a $50,000 limit on tort damages against state and state employees); Va. Code Ann. § 51.5-46(A) (1990) (allows compensatory damages but prohibits damages for pain and suffering); W. Va. Code Ann. §§ 5-11-13(c), 5-11-10 (1991) (see historical notes in 1991 database) (while compensatory damages are available in court, a complainant in an administrative proceeding could only receive incidental compensatory damages, the modern equivalent of $1,000 in 1977).

[15] See N.J. Stat. Ann. § 10:5-13 (1990) (allowing private right of action for violations of public accommodation statute) and *Doe* v. *Div. of Youth & Family Servs.*, 148 F. Supp. 2d 462, 496 (D.N.J. 2001) (holding that public accommodation statute coverage is limited to the few state facilities listed in the statute); Ohio Rev. Code Ann. § 4112.99 (1990) (private right of action not clearly applicable to facilities other than "public buildings"); Wis. Stat. Ann. § 101.13(4) (1990) (private right of action not clearly applicable to facilities other than "public buildings" and recovery limited to costs, disbursements and attorney's fees).

(1968).[16] Without attorney's fees, however, an individual who has suffered discrimination may not be able to find an attorney willing to file an action on his or her behalf. See, *e.g.*, H.R. Rep. No. 94-1558, at 1 (1976) ("Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts * * *."). Furthermore, the threat of paying a successful plaintiff's attorney's fees, like the threat of paying damages, gives states an incentive to comply with a prohibition.

Nevertheless, seven of the states that allowed some private right of action against the state did not provide attorney's fees for a successful plaintiff.[17] Three states that covered facilities and allowed a full private right of action against the state for damages did not have an attorney's fees provision.[18] Four other states that allowed only a limited private right of action

[16] See generally S. Rep. No. 94-1011, at 2–6 (1976), part of the legislative history of the Civil Rights Attorney's Fees Awards Act of 1976, which added what is now Rev. Stat. § 722(b), 42 U.S.C. § 1988(b). The attorney's fee provision of the ADA, Section 505, 42 U.S.C. § 12205, was based on the Civil Rights Attorney's Fees Awards Act. H.R. Rep. No. 101-485, pt. 3, at 73 (1990). Thus, the discussion of attorney's fees in the legislative history of the 1976 statute is relevant to the ADA provision as well.

[17] A person with a disability is generally guaranteed attorney's fees only if the state had an explicit attorney's fees provision applicable to state discrimination in providing access to facilities. See, *e.g.*, *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 269 (1975) (generally courts may not award attorney's fees absent a legislative instruction to do so); *Sutherland* v. *Nationwide Gen. Ins. Co.*, 657 N.E.2d 282–83 (Ohio Ct. App. 1995) (refusing to award attorney's fees to a plaintiff who sued under an Ohio anti-discrimination law allowing "other appropriate relief" because statute did not explicitly authorize recovery of attorney's fees).

[18] See Pennsylvania (section in current law allowing attorney's fees, see Pa. Stat. Ann. tit. 43, § 962(c.2) (2003), effective in 1991); R.I. Gen. Laws § 42-87-4 (1990) (relief provision does not include attorney's fees); Tex. Hum. Res. Code Ann. § 121.004(b) (1990) (same).

against the state for facilities violations did not allow attorney's fees.[19]

B. Coverage of State Facilities

In addition to addressing states' failure to provide adequate remedies for discrimination in the provision of access to facilities, Title II addressed important shortcomings in the scope of some states' facilities coverage. Title II prohibits states from discriminating in access to all state facilities, including public buildings, such as court houses and schools, as well as public sidewalks, streets, and recreational facilities. Accessible sidewalks and streets are particularly important rights guaranteed by Title II because, without them, a person with a disability might never get to an accessible building and the accessible services therein:

> "Without curb cuts, people with ambulatory disabilities simply cannot navigate the city; activities that are commonplace to those who are fully ambulatory become frustrating and dangerous endeavors. At present, people using wheelchairs must often make the Hobson's choice between traveling in the streets—with cars and buses and trucks and bicycles—and traveling over uncut curbs which, even when possible, may result in the wheelchair becoming stuck or overturning, with injury to both passenger and chair." *Kinney* v. *Yerusalim*, 9 F.3d 1067, 1069 (3d Cir. 1993).

[19] See Colo. Rev. Stat. Ann. §§ 24-34-605, 24-34-306 (1990) (relief does not include attorney's fees); Conn. Gen. Stat. Ann. § 46a-99 (1990) (relief provision does not include attorney's fees); Kan. Stat. Ann. § 44-1005 (1990) (same); Ohio Rev. Code Ann. § 4112.99 (2003) (historical text unavailable) (allowing damages and "other appropriate relief" for some facilities violations) and *Sutherland* v. *Nationwide Gen. Ins. Co.*, 657 N.E.2d 281, 283 (Ohio Ct. App. 1995) (finding that Ohio Rev. Code Ann. § 4112.99 does not authorize attorney's fees).

At the time Congress passed the ADA, four states did not have statutes that clearly applied to state facilities other than buildings. For example, as noted above, petitioner had a policy requiring accessibility in all "public buildings." Tenn. Code Ann. § 68-18-202 (1990). The state's definition of "public buildings" however, did not include other facilities such as streets, sidewalks, and recreational facilities. Tenn. Code Ann. § 68-18-203(2) (1990). Three other states had statutes that, like Tennessee's, covered public buildings but failed to clearly cover such other facilities.[20]

Furthermore, some state statutes which covered state facilities did not provide sufficient accessibility guidelines or require an agency to promulgate accessibility regulations. For example, Nebraska's statute contained some specific requirements for facilities accessibility and provided that the "Public Buildings Safety Advisory Committee *may* promulgate and implement codes pursuant to sections 72-1101 to 72-1119 consistent with the uniform building codes and standards set by the American Standards Association, Inc." Neb. Rev. Stat. § 72-1122 (1990) (emphasis added). Thus it was left to the Public Buildings Safety Advisory Committee to decide whether to adopt detailed guidelines to facilitate compliance with vague requirements such as those provided for door thresholds. *Id.* § 72-1108 ("[A]s much as practicable" door thresholds "shall be flush with the

[20] See N.J. Stat. Ann. § 52:32-4 (1990) (public buildings required to "provide facilities for the physically handicapped") and *Doe* v. *Div. of Youth & Family Servs.*, 148 F. Supp. 2d 462, 496 (D.N.J. 2001) (holding that some state facilities are not covered by public accommodation statute); Ohio Rev. Code Ann. § 3781.111(A) (2003) (historical text unavailable) (covers public buildings but not facilities), and *id.* §§ 4112.02(G), 4112.01(A)(9) (2003) (historical text unavailable) (discrimination in public accommodations prohibited, but definition of public accommodation does not explicitly include the state); Wis. Stat. Ann. § 101.13(2)(d) (1990) (covers public buildings but not facilities).

floor.").[21] As recognized in *Hibbs*, 123 S. Ct at 1981, Congress could "reasonably conclude" that statutes such as Nebraska's "offered significantly less firm protection" than Title II which mandated compliance with the Attorney General's detailed accessibility regulations that were to be based on the regulations already promulgated under Section 504 of the Rehabilitation Act.

* * * *

In sum, thirty-four states had facilities accessibility provisions with at least one significant shortcoming in the remedial scheme or coverage of facilities. These shortcomings standing alone provided Congress with sufficient justification for passing Title II. See *Hibbs*, 123 S. Ct. at 1980-81 (relying on shortcomings in only fourteen states). But Congress was also concerned with the lack of accessibility in state services and, as demonstrated below, states failed to provide adequate protection in this area as well.

[21] The American Standards Association, which published standards referenced in Nebraska's statute, changed its name to American National Standards Institute ("ANSI") in 1969. See American National Standards Association, *ANSI—An Historical Overview*, http://www.ansi.org/about_ansi/introduction/history.aspx?menuid=1 (visited Nov. 9, 2003). The ANSI standard for door thresholds provided: "Thresholds at doorways shall not exceed ¾ inch (19 mm) in height for exterior residential sliding doors or ½ in (13 mm) for other types of doors. Raised thresholds and floor level changes at accessible doorways shall be beveled with a slope no greater than 1:2 (see 4.5.2)." American National Standard for Buildings and Facilities § 4.13.8 (1986).

III. When the ADA Was Enacted, Individual State Laws Failed To Protect Persons with Disabilities Against Discrimination in the Provision of State Services.

As demonstrated in Part II above, states failed to provide adequate protection from discrimination in access to state facilities in 1990. In Part III we demonstrate that in 1990 states provided even less protection with respect to state services. Many state laws failed to cover state services at all, and many that did had substantial shortcomings in that coverage. And, as with state facilities, the remedies provided under state law fell well short of those provided under the ADA.

A. Coverage of State Services

When the ADA was enacted, only twenty-four states provided statutory protection against disability discrimination in the provision of public services and programs. In the states which did offer such protection, the statutes often took the form of "public accommodation" laws that could be interpreted to cover state services as well as facilities.[22] For example, New Mexico had a statute forbidding any person, specifically including the state, "in any public accommodation" from discriminating in "offering or refusing to offer its *services*, facilities, accommodations or goods to any individual because of * * * physical or mental handicap." N.M. Stat. Ann. §§ 28-1-7(f) and 28-1-2(A) (1990) (emphasis added). Thus, we assume that a claimant could sue the state if it were discriminating against that individual with respect state services (or programs or activities) because of his or her disability.

[22] The discussion of accessibility requirements for state facilities in Part II included public accommodation statutes, which can apply to both facilities and services, as well as statutes applicable only to buildings and facilities.

Twenty-six of the states, however, had no such statutory protection. First, similar statutes in three states—Arizona, Kentucky, and Tennessee—did not cover persons with disabilities at all.[23] In these states, the statutes prohibited discrimination on the basis of sex, national origin and the like but left persons with disabilities without protection.

Second, in thirteen states, the general public accommodation statute either did not cover or was not enforceable against the state. For example, in Mississippi, the only penalty for a violation of the statute was a misdemeanor which would not be enforceable against the state. See Miss. Code Ann. § 43-6-11 (1990).[24] In other states, the types of public accommodations covered by the statute did not expressly include state-run accommodations and services. See, *e.g.*, Cal. Civ. Code § 51 (1990) (prohibiting discrimination on the basis of physical disability by "business establishments") and *Black* v. *Dep't of Mental Health*, 100 Cal. Rptr. 2d 39, 42 n.4 (Ct. App. 2000) (declining to address the lower court's ruling that the state was not covered by the act).[25]

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[23] See Ariz. Rev. Stat. § 41-1441 (1990); Ky. Rev. Stat. Ann. § 344.120 (1990); Tenn. Code Ann. § 4-21-501 (1990).

[24] See also Ala. Code § 21-7-5 (1990) (only penalty a misdemeanor); Ark. Code Ann. § 20-14-302 (1990) (same); Ga. Code Ann. § 30-3-6, (1990) (same); Idaho Code § 39-3210 (1990) (same); Neb. Rev. Stat. § 20-129 (1990) (same); Utah Code Ann. § 26-30-4 (1990) (same); Wyo. Stat. Ann. § 35-13-203 (1990) (same).

[25] See also Del. Code Ann. tit. 6, § 4501 (1990) and Del. Op. Att'y Gen. No. 00-IB09 (May 30, 2000), 2000 WL 1092966 (Del. A.G.) (state is not covered by statute); N.H. Rev. Stat. Ann. § 155:39-b (1990) (providing a narrow definition of "public accommodation" that does not expressly include the state); N.J. Stat. Ann. § 10:5-5 (1990) (definition of "public accommodation" does not include state under *Doe* v. *Division of Youth & Family Services*, 148 F. Supp. 2d 462, 496 (D.N.J. 2001)); Wis. Stat. Ann. § 101.22(1m)(bp) (1990) (providing definition of public accommodation that does not expressly include the state).

Finally, twenty states had statutes prohibiting disability discrimination with respect to general public accommodations, but unlike New Mexico, these statutes did not clearly cover "services." For example, Washington had a statute prohibiting any person from committing an act which "results in any distinction, restriction, or discrimination * * * in any place of public resort, accommodation, assemblage, or amusement" regardless of disability. Wash. Rev. Code Ann. § 49.60.215 (1990). As in New Mexico, the term "person" was defined to include the state. See Wash. Rev. Code Ann. § 49.60.040 (1990). But the statute did not prohibit such discrimination in the provision of services or programs or activities. To the contrary, in *Fell* v. *Spokane Transit Authority*, 911 P.2d 1319, 1329 (Wash. 1996), the Supreme Court of Washington held that the statute could not be interpreted to cover transportation services offered by the city. The Court held that:

> "What must be very clear * * * is that the [state] statutory mandate to provide access to places of public accommodation is not a mandate to provide services. While entitlement to services may be in the ADA, the Legislature has not enacted a counterpart to the ADA in Washington creating such entitlements." *Id.*[26]

Thus, in Washington, state buildings that accommodate the public may be covered by the statute, but none of the services provided by the state would be.

Of the twenty states that failed to cover discrimination in the provision of services, ten also failed to cover the state (and hence have already been counted in the thirteen states listed above).[27] Ten additional states, including Washington,

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[26] See Colker and Milani, 53 Ala. L. Rev. at 1093–94, for discussion of case and similar case in Ohio.

[27] See Ala. Code § 21-7-3 (1990); Ark. Code Ann. § 20-14-303 (1990); Del. Code Ann. tit. 6, § 4501 (1990); Ga. Code Ann. § 30-3-1 (1990);

had statutes that did cover the state, at least with respect to its buildings, but failed to cover services.[28]

Adding up the three states that had statutes that did not cover disability discrimination, the thirteen states that had statutes that did not cover the state, and the ten additional states that did cover the state but did not cover services, there were twenty-six states that failed to provide statutory protection against disability discrimination with respect to state services.

B. Limitations in Coverage of State Services

Having established that only twenty-four states had any form of statutory protection against disability discrimination in the provision of state services, we now turn to the various limitations in that protection as compared to what Congress deemed necessary in Title II of the ADA. As we demonstrate below, many of the statutes failed to cover critical populations of persons with disabilities. They also by and large failed to require that states make reasonable modifications in such services to ensure that persons with disabilities would not be denied the benefits of public services. Finally, we show that in many of the states, as with facilities, the remedies with respect to discrimination in

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Idaho Code § 39-3201 (1990); Miss. Code Ann. § 43-6-5 (1990); Neb. Rev. Stat. § 20-127 (1990); Utah Code Ann. § 26-30-1 (1990); Wis. Stat. Ann. § 101.22(9)(a) (1990); Wyo. Stat. Ann. § 35-13-201 (1990).

[28] Fla. Stat. Ann. § 413.08(1) (1990) (public accommodations statute does not cover services), but see Fla. Stat. Ann. § 393.13 (1990) (covering services discrimination with respect to narrowly defined population of "developmentally disabled"); Ind. Code Ann. § 22-9-1-2(a) (1990); Md. Ann. Code art. 49B, § 7 (1990); Me. Rev. Stat. Ann. tit. 5, § 4551 (1990); N.Y. Exec. Law § 296(2)(a) (1990); Ohio Rev. Code Ann. § 4112.02 (2002) (historical text unavailable), see also *Davis* v. *Flexman*, 109 F. Supp. 2d 776 (S.D. Ohio 1999) (holding that statute does not apply to services); N.D. Cent. Code § 48-02-19 (1991) (see historical notes in 1991 database); Tex. Hum. Res. Code Ann. § 121.001 (1990); Vt. Stat. Ann. tit. 9, § 4502 (1990).

public services were inadequate to address the problem of discrimination effectively.

1. Definition of Persons with Disabilities

A critical step in prohibiting discrimination on the basis of disability is to define the protected class with sufficient breadth. Persons with both physical and mental impairments have long suffered discrimination in this country. So too have persons who have a record of impairment or who are regarded as having such an impairment.

Congress recognized that all such persons need protection against discrimination when it enacted the Rehabilitation Act of 1973 and the 1978 amendments thereto. See 29 U.S.C. § 794 and historical notes. Moreover, by 1990, this Court had similarly recognized the importance of these elements. In *City of Cleburne*, this Court noted that persons with mental disabilities are often the subject of discrimination on the basis of "negative attitudes and fear." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985) (holding that the city council's denial of a special use permit under a zoning ordinance that prevented a home for persons with mental impairments was unconstitutionally discriminatory under the Fourteenth Amendment).

It is also clear that invidious discrimination can be aimed at persons who, though not currently disabled, have a record of disability or are regarded as having such a disability. Indeed, in *School Board* v. *Arline*, 480 U.S. 273, 284 (1987), this Court recognized that by including both having a "record of" disability and being "regarded as" having a disability in the definition of disability in the Rehabilitation Act, "Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment."

In light of this history, it is not surprising that Congress incorporated these elements into the definition of "disability"

in the ADA. Thus, Section 3(2) of the ADA defines "disability" to mean:

> "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> "(B) a record of such an impairment; or
>
> "(C) being regarded as having such an impairment." 42 U.S.C. § 12102(2).

Looking at the landscape of state law in 1990, however, several states failed to incorporate these critical categories. For example, Nevada and Kansas each had statutes that prohibited discrimination in the provision of services, but their coverage of persons with disabilities was limited to those with "physical and visual" impairments (Nev. Rev. Stat. Ann. § 651.070 (1991) (see historical notes in 1991 database) or those with a "physical handicap" (Kan. Stat. Ann. § 44-1009(c)(3) (1990)). Similarly, South Carolina prohibited discrimination against persons because of "handicap" but specifically excluded persons with "mental illness." See S.C. Code Ann. §§ 43-33-520, 43-33-560 (1990).[29]

[29] The exclusion of persons with mental impairments was also pervasive in states which did not cover discrimination in the provision of state services as listed in Part A above. See Ala. Code § 21-7-3 (1990); Ark. Code Ann. § 20-14-303 (1990); Cal. Civ. Code § 51 (1990) (only covering physical disability) and Cal. Gov't Code § 12944 (1990) (specifically relating to licensing boards but only covering "medical conditions or physical handicap" and not "mental handicap"); Del. Code Ann. tit. 6, § 4501 (1990); Fla. Stat. Ann. § 413.08(1) (1990) and Fla. Stat. Ann. § 393.13 (1990) (covering narrowly defined population of "developmentally disabled"); Ga. Code Ann. § 30-3-1 (1990); Idaho Code § 39-3201 (1990); Miss. Code Ann. § 43-6-5 (1990); Neb. Rev. Stat. § 20-127 (1990); N.D. Cent. Code § 48-02-19 (1991) (see historical notes in 1991 database); N.H. Rev. Stat. Ann. § 354-A:3 (1990) (excluding mental illness from the definition of "physical or mental disability"); Utah Code Ann. § 26-29-2 (1990); Wis. Stat. Ann. § 101.22(1m)(b) (1990) (covers narrowly defined population of developmentally disabled); Wyo. Stat. Ann. § 35-13-201(a) (1990).

In addition, eleven of the states that prohibited disability discrimination in the provision of public services failed to include in the protected class persons who are "regarded as" having an impairment and persons who have a "record of" an impairment.[30] Desiring to put an end to discrimination based on such "accumulated myths and fears," Congress drafted the ADA to include protection for both groups. See Section 3(2), 42 U.S.C. § 12102(2).

2. Reasonable Modification

Another significant problem with many state statutes was their failure to require that the states make even simple

[30] See Conn. Gen. Stat. Ann. § 46a-64 (1990); Iowa Code Ann. § 601A.2 (1990); Kan. Stat. Ann. § 44-1002 (1990); Mass. Gen. Laws ch. 272, § 98 (1990); Mich. Comp. Laws § 37.1103 (1990); Mo. Rev. Stat. § 213.010 (1990) (definitions do not include "record of"); Mont. Code Ann. § 49-2-101 (1990) (according to 1991 statute annotation, until 1991 amendment neither group included in definitions); Nev. Rev. Stat. Ann. § 651.050 (1990) (according to 1989 Westlaw database and annotations to current statute, neither group was included in this statute or any others relating to persons with disabilities); Pa. Stat. Ann. tit. 43, § 954 (1990) (neither group included until this statute was amended in 1991); S.C. Code Ann. § 43-33-560 (1990); Va. Code Ann. § 51.5-3 (1990) (definitions do not include "regarded as").

Another eighteen states that did not have protection with respect to the state services also failed to include these elements in their definition of disabled with respect to discrimination in public accommodations. See Ala. Code § 21-7-3 (1990); Ark. Code Ann. § 20-14-303 (1990); Cal. Gov't Code § 12926 (1990); Del. Code Ann. tit. 6, § 4501 (1990); Fla. Stat. Ann. § 413.08 (1990); Ga. Code Ann. § 30-3-1 (1990); Idaho Code § 39-4126 (1990); Ind. Code Ann. § 22-9-1-3(r) (1990); Md. Ann. Code art. 49B, § 5 (1990); Me. Rev. Stat. Ann. tit. 5, § 4553 (1990); Miss. Code Ann. § 43-6-5 (1990); Neb. Rev. Stat. § 20-127 (1990); N.H. Rev. Stat. Ann. § 354-A:3 (1990); Tex. Hum. Res. Code Ann. § 121.002(4) (1990); Utah Code Ann. § 26-29-2 (1990); Wash. Rev. Code Ann. § 70.84.010 (1990); Wis. Stat. Ann. § 101.13 (1990); Wyo. Stat. Ann. § 35-13-201(a) (1990).

modifications to their services and programs to avoid excluding persons with disabilities from participating in or enjoying the benefits of such services and programs. In passing the ADA, Congress recognized that such a requirement was essential to ensure that discrimination could not persist under false rationales. See, *e.g.*, *US Airways, Inc.* v. *Barnett*, 535 U.S. 391, 401 (2002) (recognizing that the ADA "seeks to diminish or to eliminate the stereotypical thought processes, the thoughtless actions, and the hostile reactions that far too often bar those with disabilities from participating fully in the Nation's life").

Thus, Title II of the ADA specifies that "qualified individual[s] with disabilit[ies]" shall not be "excluded from participation in or be denied the benefits of" such services by reason of their disabilities. Section 202, 42 U.S.C. § 12132. In turn, a "qualified individual with a disability" is defined to be a person who,

> "with or without *reasonable modifications* to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." Section 201(2), 42 U.S.C. § 12131(2) (emphasis added).

The Attorney General's regulations issued pursuant to Section 204(a), 42 U.S.C. § 12134(a), interpret this definition to require a public entity to

> "make *reasonable modifications* in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7) (2003) (emphasis added).

Thus, Title II requires that public entities, including states, make "reasonable modifications" to their policies, practices, and procedures in order to insure that persons with disabilities can participate in and benefit from public services.

Nevertheless, when Congress enacted Title II, only four of the twenty-four states that had a statutory prohibition against disability discrimination in state services incorporated an express obligation to make such modifications with respect to such services.[31]

3. Remedies

The remedies available under state law for violations of state accessibility requirements in the provision of state services were, like the states' remedies for facilities violations, substantially more limited than the remedies available under Title II. First, taking the same twenty-four states that did provide statutory protection against disability discrimination in the provision of state services, six failed to provide for damages as a remedy for violations by the state

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[31] Minn. Stat. Ann. § 363.03(3)(2), (4)(1) (1991) (see historical notes in 1991 database), Mo. Ann. Stat. § 213.010(8) (1990), N.C. Gen. Stat. § 168A-3(10)(b) (1990); S.D. Codified Laws § 20-13-23.7 (1990) Four other states had statutes incorporating the "programs and activities" language from the Rehabilitation Act. See Haw. Rev. Stat. Ann. § 368-1.5(a) (1990); La. Rev. Stat. Ann. § 46:2254 (1990); Mass. Gen. Laws Ann. Const. Amend. CXIV (1990); Va. Code Ann. § 51.5-40 (1990). We note that courts in these states, like this court, could interpret such language to require reasonable modification, so the lack of a specific statutory requirement may be less troubling in those states. See *Alexander* v. *Choate*, 469 U.S. 287, 300 (1985) (construing statute to mean that "while a grantee need not be required to make 'fundamental' or 'substantial' modifications to accommodate the handicapped, it may be required to make 'reasonable' ones").

(even to remedy and deter intentional discrimination),[32] and another five significantly limited such damages.[33]

Second, of the twenty-four states that covered services, eight did not allow successful plaintiffs to obtain attorney's fees for claims involving services.[34] As discussed in more detail in Part II above, without the availability of such an award, enforcement is substantially limited, especially where the relief sought does not otherwise entail damages.

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The limitations in state laws prohibiting discrimination in access to facilities and services show that only Minnesota had statutory protections in the areas we have discussed at least as

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[32] Colo. Rev. Stat. Ann. §§ 24-34-306, 24-34-605 (1990) (no compensatory relief); Conn. Gen. Stat. Ann. § 46a-99 (1990) (no compensatory relief); Haw. Rev. Stat. Ann. § 489-7.5 (1990) (provision allowing private right of action not effective until 1991); N.C. Gen. Stat. § 168A-11(b) (1990) (no damages); Okla. Stat. tit. 25 § 1402 (1990) (no compensatory relief); S.D. Codified Laws § 20-13-23 (1990).

[33] Kan. Stat. Ann. § 44-1005(k) (1990) (limited damages for pain suffering and humiliation to $2,000); Nev. Rev. Stat. Ann. § 651.090(1) (1991) (see historical notes in the 1991 database) (Section 41.035 (1991) imposes a $50,000 limit on tort damages against state and state employees); S.C. Code Ann. § 43-33-540 (1990) (limits actual damages to $5,000); Va. Code Ann. § 51.5-46A (1990) (no damages for pain and suffering); W. Va. Code Ann. §§ 5-11-13(c), 5-11-10 (1991) (see historical notes in 1991 database) (while compensatory damages are available in court, a complainant in an administrative proceeding could only receive incidental compensatory damages, the modern equivalent of $1,000 in 1977).

[34] See Colo. Rev. Stat. Ann. §§ 24-34-605; 24-34-306 (1990); Conn. Gen. Stat. Ann. § 46a-99 (1990) (relief provision does not include attorney's fees); Kan. Stat. Ann. § 44-1005 (1990) (same); Haw. Rev. Stat. Ann. § 489-7.5 (1990) (provision allowing attorney's fees not effective until 1991);); Okla. Stat. tit. 25 § 1402 (1990) (relief provision does not include attorney's fees); Pennsylvania (section in current law allowing attorney's fees, see Pa. Stat. Ann. tit. 43, § 962(c.2) (2003), was added in 1991); R.I. Gen. Laws § 42-87-4 (1990); S.D. Codified Laws § 20-13-24 (1990) (no attorney's fees provision).

strong as those Congress deemed adequate to ensure that persons with disabilities be able to enjoy the benefits of critical state services, programs and activities. Thus, it can hardly be said that Congress enacted the ADA, and Title II in particular, against a backdrop of sufficient or effective state laws.

IV. Invalidating Title II of the ADA Would Severely Undermine the Protections Currently Afforded to Persons with Disabilities in a Majority of States.

Unfortunately, since the enactment of the ADA, only a few states have improved their disability statutes with respect to state facilities and services. As a recent study in the University of Alabama Law Review concludes, "Our study confirms * * * [that] only a minority of states actually have statutory protection against disability discrimination * * * similar to that found in ADA Title II."[35]

Facilities access statutes remain inadequate in the majority of states. While six states have revised their statutes to allow damage suits against the state for failing to provide access to facilities,[36] none of the states that prohibited or limited such damages have abandoned these restrictions. Of the seven states that allowed a private right of action for damages but did not allow attorney's fees, only Pennsylvania has adopted such a provision.[37] Finally, none of the states that failed to

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[35] Ruth Colker and Adam Milani, *The Post-Garrett World: Insufficient State Protection Against Disability Discrimination*, 53 Ala. L. Rev. 1075, 1113 (2002).

[36] See Ariz. Rev. Stat. Ann. § 41-1492.09 [B] (2003); Haw. Rev. Stat. Ann. § 489-7.5(a)(1) (2003); Ind. Code Ann. §§ 22-9-8-1, -3 (2003); N.D. Cent. Code § 14-02.4-20 (2003), and *State* v. *Haskell*, 621 N.W.2d 358, 360 (N.D. 2001) (finding damages are available under § 14-02.4-20); N.H. Rev. Stat. Ann. § 354-A:21 (2003); S.D. Codified Laws § 20-13-35.1 (2003).

[37] See Pa. Stat. Ann. tit. 43, § 962(c.2) (2003).

require accessibility to all state facilities in 1990 has added such a requirement.

State laws pertaining to services likewise remain inadequate today. Since 1990 only four states—Kentucky, Maine, North Dakota and Vermont—have added statutes that prohibit the state from discriminating in the provision of its services.[38] Of the six states which covered state services but did not provide a private right of action for damages, only Hawaii and South Dakota have revised their statutes to allow such relief.[39] Similarly, while eight states broadened their definition of disability to cover at least some persons with mental impairments,[40] and ten states have done so to include those with a record of impairment or who are regarded as having an impairment,[41] over twenty states still have definitions of disability more limited than the ADA.

Thus, the Brief of *Amici Curiae* Alabama *et al.* in Support of petitioner is simply wrong when it asserts (at 24) that "existing State laws are sufficient to address the vast majority of accessibility problems." In fact, the need for Title II of the ADA is as real now as it was in 1990. There can be no assurance that the state legislatures which have not acted

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[38] Ky. Rev. Stat. Ann. §§ 344.120, 344.130 (2003); Me. Rev. Stat. Ann. tit. 5, §§ 4592, 4553 (2003); N.D. Cent. Code §§ 14-02.4-14, 14-02.4-15 (2003); Vt. Stat. Ann. tit. 9, §§ 4502(c), 4501(1) (2003).

[39] Haw. Rev. Stat. Ann. § 489-7.5 (2003) (effective in 1991), S.D. Codified Laws § 20-13-35.1 (2003).

[40] Ariz. Rev. Stat. Ann. § 41-1492 (2003); Cal. Gov't Code § 12926 (2003); Del. Code Ann. tit. 6, § 4502 (2003); Kan. Stat. Ann. § 44-1002 (2003); Ky. Rev. Stat. Ann. § 344.010 (2003); N.H. Rev. Stat. Ann. § 354-A:2 (2003); Nev. Rev. Stat. Ann. § 651.050 (2003); Wis. Stat. Ann. § 106.52(c) (2003).

[41] Ariz. Rev. Stat. Ann. § 41-1492 (2003); Cal. Gov't Code § 12926 (2003); Kan. Stat. Ann. § 44-1002 (2003); Ky. Rev. Stat. Ann. § 344.010 (2003); Me. Rev. Stat. Ann. tit. 5, § 4553 (2003); Mo. Rev. Stat. § 213.010 (2003); Mont. Code Ann. § 49-2-101 (2003); Nev. Rev. Stat. Ann. § 651.050 (2003); Pa. Stat. Ann. tit. 43, § 954 (2003); Wis. Stat. Ann. § 106.52(c) (2003).

since 1990 would act now to rectify the deficiencies in their laws if this Court were to strike down Title II as applied to the states. Yet discrimination against persons with disabilities will not simply go away. Accordingly, the comprehensive coverage and remedies available under Title II of the ADA are vital to the protection of persons with disabilities, and many persons with disabilities will be harmed if these protections are taken away.

CONCLUSION

For the reasons set forth in the Briefs for Respondents and above, this Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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